BINTULU ADHESIVES & CHEMICALS SDN BHD

v.

CHUAH SEAH JOO PLYWOOD INDUSTRY (SARAWAK) SDN BHD

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[SUIT NO: 22-98 OF 1999]
29 SEPTEMBER 2000

CIVIL PROCEDURE: *Service - Memorandum of appearance - Whether service bound by 10-day time limit for entering appearance - Rules of the High Court 1980, O. 12 r. 2*

CIVIL PROCEDURE: *Action - Application to set aside appearance - Delay of four months - Whether application made within reasonable time - Rules of the High Court 1980, O. 2 r. 2 - Whether plaintiff took fresh step in action*

CIVIL PROCEDURE: *Judgment - Judgment obtained in default of defence - Whether failure to serve statement of claim on defendant rendered judgment irregular - Whether defendant should indicate in memorandum of appearance that statement of claim should be served - Rules of the High Court 1980, Form 15*

There were two applications before the court. The first was the defendant's application to set aside a judgment in default of defence entered against it. The second was the plaintiff's application to set aside the appearance entered by the defendant to this action and to amend the said judgment in default of defence to that of judgment in default of appearance.

The issues were: (1) whether the defendant's appearance could be set aside on the basis that the copy of the memorandum of appearance was served on the plaintiff outside the ten-day time limit for entering appearance under O. 12 r. 4(b) Rules of the High Court 1980 ('RHC'); (2) whether the plaintiff's failure to serve the statement of claim on the defendant rendered the judgment irregular; (3) whether the failure of the plaintiff's counsel to adhere to r. 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988 ('the 1988 Rules') entitled the defendant to set aside the judgment in default of defence.

The plaintiff raised two preliminary objections. Firstly, that the defendant's application was made pursuant to O. 12 r. 9 RHC but there was no such rule in O. 12. Secondly, that the defendant did not state the grounds of the application as required by Form 62 RHC 1980.

Held:

[1] The plaintiff must be aware that the provisions of the RHC under which it proceeded to obtain a judgment in default of defence was O. 19 RHC and that r. 9 of O. 19 empowers the court to set aside or vary any judgment obtained in default of defence. The plaintiff could not have been misled. The defendant meant to proceed under O. 12 and not O. 19. That was because the defendant clearly stated in its application that one of the orders sought was for the judgment in default of defence to be set aside.

[1a] The plaintiff was in a position to know what the grounds of the defendant's application were because the application did state that the grounds were stated in the affidavit that was annexed to it. Therefore, there was substantial compliance with Form 62 RHC by the defendant.

[1b] As the defects complained of were minor irregularities which did not prejudice the plaintiff, the court exercised its discretion under O. 2 rr. 1 and 2 RHC to excuse such irregularities and accordingly overrule the plaintiff's preliminary objections.

[2] A memorandum of appearance and a copy thereof may be handed at the court registry on the last day of the time limit for entering an appearance. It followed that if the defendant were to post to the plaintiff the said copy returned by the registry, the plaintiff would only receive the said copy outside the time limit for entering appearance. Therefore, a defendant is not required to serve a copy of the memorandum of appearance on a plaintiff within the time limit for entering appearance.

[3] The plaintiff took about four months to file its application to set aside the defendant's appearance. A period of four months was not a reasonable time within which to make the application under O. 2 r. 2 RHC. The plaintiff was also aware of the alleged irregularity but took a fresh step in the action by entering the judgment in default of defence against the defendant. Having done so, the plaintiff was clearly caught by O. 2 r. 2 RHC.

[4] With an appearance having been entered by the defendant, there was no basis for the plaintiff's application to amend the judgment from one in default of defence to one in default of appearance. That application was dismissed with costs.

[5] Whilst O. 12 r. 2(2) RHC does state that a memorandum of appearance must be in Form 15, O. 12 r. 2(3) specifically states what must be specified in the memorandum of appearance. There is no requirement that a defendant must indicate whether or not he requires a statement

of claim to be filed and delivered to him. Also, O. 18 r. 1 RHC requires a plaintiff to serve a statement of claim on a defendant unless excused from so doing by the court or the statement of claim is already indorsed on the writ.

[6] The words found in Form 15 RHC indicate that a defendant must consciously elect whether or not he requires a statement of claim to be filed and delivered to him. Until an election is made, the plaintiff is not excused from delivering its statement of claim on the defendant.

[7] The very conduct between counsel which r. 56 of the 1988 Rules seeks to regulate is that of obtaining a judgment in default. The fact that an advocate who breaches this rule may be subject to disciplinary action serves to emphasise the seriousness with which such a breach is regarded.

[8] On the facts of the case, it would be premature to consider whether the defendant had a defence of merits because the plaintiff had not even served a statement of its claim on the defendant. All the defendant was supplied with was a concise statement of the nature of the plaintiff's claim, to which, the rules of the court did not require the defendant to plead in answer to.

[9] Justice of the case called for the judgment in default of defence to be set aside. It was obtained when the plaintiff was not entitled in law to obtain the same. To allow the judgment to remain would deprive the defendant of a substantive right afforded to it by the rules, *ie*, to be served with a statement of the plaintiff's claim and to file a defence thereto.

[Judgment in default of defence set aside.]

Case(s) referred to:

BSN Commercial Bank (M) Bhd v. KDG Holdings (M) Sdn Bhd & Ors [1999] 2 CLJ 180 ***(foll)***

Lai Yoke Ngan v. Chin Teck Kee [1997] 3 CLJ 305 ***(foll)***

Syarikat Joo Seng & Anor. v. Habib Bank Ltd [1986] 2 MLJ 129 ***(refd)***

RHB Finance Bhd v. CN Corporate Network (M) Sdn Bhd & Ors [2000] 2 CLJ 251 ***(foll)***

UMW (Sarawak) Sdn Bhd v. Kim Leong Timber Sdn Bhd & Ors [1989] 3 MLJ 177 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 2 rr. 1, 2, O. 12 rr. 1(3), 2(1), (2), (3), 3(2), 4(b), 9, O. 18 rr. 1, 2, O. 19 r. 9

Sarawak Advocates (Practice and Etiquette) Rules 1988, r. 56

For the plaintiff - Jonathan Chong; M/s Tang & Tang, Wahap, Nyumbang & Co
For the defendant - Stephen Chung; M/s Stephen Robert & Wong

Reported by Usha Thiagarajah

JUDGMENT

Clement Skinner J:

Decision

There are two applications before me. The first is made by the defendant herein to set aside a judgment in default of defence entered against it. The second is made by the plaintiff herein and seeks to set aside the appearance entered by the defendant to this action as well as to amend the judgment it has entered against the defendant. By the proposed amendment, the plaintiff seeks to have the judgment entered in default of defence to read as one in default of appearance. The facts giving rise to these applications may be shortly stated.

On 30 November 1999 the plaintiff commenced this action against the defendant.

The writ issued out of the registry was not indorsed with a statement of claim; it was instead indorsed with a concise statement of the nature of the claim made. That claim was for the sum of RM307,575.27 being the price of goods sold and delivered together with interest thereon. The plaintiff also, further or in the alternative, claimed against the defendant as drawer of six cheques, all identified in the indorsement, which upon presentation for payment were dishonoured and although the defendant had notice of such dishonour did not pay the same. The total amount due on the six cheques amounted to RM307,625.94, upon which the plaintiff also sought interest from date of judgment to full payment.

The writ, indorsed only as abovementioned, was served on the defendant on 22 December 1999. There is no dispute between the parties that under O. 12 r. 4(b) Rules of the High Court 1980 (hereafter 'the RHC'), the time limited for the defendant to enter appearance in this action was ten days after service of the writ and would accordingly have expired on 31 December 1999. The defendant entered an appearance, through its solicitors, on 30 December 1999 by handing in at the High Court Registry, Sibu, a memorandum of appearance and a copy thereof. However, the solicitors for the defendant did not on the same day post to the plaintiff a copy of the memorandum of appearance handed back to them by the Registry, as required by O. 12 r. 3(2) RHC. The solicitors for the defendant only served the memorandum of appearance on

the plaintiff's solicitors on 14 January 2000, by which time, according to the plaintiff, the time limited for entering appearance had expired. The plaintiff's solicitors, nevertheless, accepted service of the memorandum of appearance but indorsed thereon the words "accept service under protest". The next thing that happened was that the plaintiff, without serving a statement of claim on the defendant, entered judgment in default of defence against the defendant on 1 February 2000 for the sum of RM307,575.27.

Having entered such judgment, the plaintiff's solicitors then on 21 February 2000 wrote to the defendant's solicitors informing them of the judgment and demanding payment of the judgment sum within seven days. The defendant's solicitors received that letter on 6 March 2000 and within 17 days thereof, filed the defendant's application to set aside the judgment on 23 March 2000.

In applying to set aside the judgment in default of defence, the defendant contends that after it had properly entered an appearance in this action it had not filed a defence as the plaintiff had not served on it a statement of its claim. Until then, according to the defendant, the plaintiff had no right to enter judgment in default of defence. In the circumstances, contends the defendant, the judgment in default of defence was obtained in breach of the provisions of the RHC and is therefore an irregular judgment and ought to be set aside. Mr. Stephen Chung of counsel for the defendant also submitted that the judgment in default of defence should be set aside for two other reasons: (a) the solicitors for the plaintiff had failed, as a matter of etiquette, to give 48 hours' notice to the solicitors for the defendant, as required by r. 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988 that unless a defence was filed, steps would be taken to enter judgment in default of defence; and (b) the defendant has a defence on the merits but at this stage of the proceedings, it is not necessary for the court to consider what those merits are.

In an attempt to protect its judgment, the plaintiff has applied to set aside the defendant's appearance on the ground that the memorandum of appearance was served out of time on the plaintiff. It is the contention of Mr. Jonathan Chong of counsel for the plaintiff that entering an appearance in an action consists not only of filing a memorandum of appearance at the registry within the time limited for doing so, but also serving a copy of the memorandum of appearance on the plaintiff within the time limited. According to counsel, unless both are done within the time limited for entering appearance, no appearance has been entered, and, until today the defendant has not applied for extension of time to serve their appearance and so the irregular appearance continues and must be set aside. In so far as the plaintiff's application to amend its judgment is concerned, the plaintiff says that as a result of an accidental slip, the judgment was entered in error and should read "judgment in default of appearance" and not "judgment in default of defence".

Before considering the merits of the respective applications, I need to deal first with two objections raised by counsel for the plaintiff against the defendant's application. Mr. Chong submitted that the defendant's application should be dismissed in limine for the reason that firstly, the defendant's application indicates it is made pursuant to O. 12 r. 9 RHC but there is no such rule in O. 12 RHC. The defendant's application is therefore made pursuant to a non-existent rule. According to counsel, it was open to the defendant to apply for leave to rectify the matter but the defendant has not done so. Secondly, the summons in chambers filed by the defendant has failed to state the grounds on which the application is made, as required by Form 62 RHC. Without knowing what those grounds are, the plaintiff is caught by surprise. According to counsel for the plaintiff, the cumulative effect of the above two defects in the defendant's application is to make it misleading.

I regret I do not find the plaintiff's claim that it has been taken by surprise and misled by the defendant's application well founded for the reason that in so far as it is complained that the defendant has anchored its application on a non-existent rule, the plaintiff must be aware that the provisions of the RHC under which it proceeded to obtain a judgment in default of defence was O. 19 RHC and that r. 9 of O. 19 empowers the court to set aside or vary any judgment obtained in default of defence and the plaintiff could not have been misled that the defendant meant to proceed under r. 9 of O. 19 and not O. 12 because the summons in chambers clearly states that one of the orders sought was for the judgment in default of defence entered on 1 February 2000 to be set aside.

With regard to the plaintiff's claim of being surprised by the defendant's application because it did not state the grounds of the application, I find that this could not be so as the plaintiff was in a position to know what those grounds were because the application did state that the grounds upon which the application is made are stated in the affidavit of Chuah Keng Hua which was affirmed in support of the defendant's application and annexed to it. I find that there has been substantial compliance with Form 62 RHC by the defendant. Counsel for the defendant has referred to me two cases in which a similar objection was taken. In both cases, the objection was overruled on the ground that there had been substantial compliance with Form 62. I respectfully concur with those rulings. The cases referred to me were *UMW (Sarawak) Sdn Bhd v. Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177 and *BSN Commercial Bank (M) Bhd v. KDG Holdings (M) Sdn Bhd & Ors* [1999] 2 CLJ 180.

For the reasons given above, I find the defects complained about to be really minor irregularities which have not resulted in any prejudice to the plaintiff. The discretion vested in a court by O. 2 r. 1 and 2 RHC to excuse such

irregularities should accordingly be exercised in favour of the defendant. I accordingly overrule the objections raised by the plaintiff.

I now turn to consider the merits of the two applications before me and begin by first considering whether the appearance entered herein by the defendant should be set aside for the reasons advanced by the plaintiff.

To recount, it is the contention of counsel for the plaintiff that to properly enter an appearance in an action, a defendant must not only file a memorandum of appearance at the registry but also serve it on the plaintiff within the time limited for entering an appearance. Counsel has not referred me to any particular rule that supports this contention or to any decided case in support of it. In resolving this question, it should be recognised that there is a difference between serving an appearance and serving a defence. In the case of a defence, O. 18 r. 2 RHC requires that a defendant must "serve" a defence on the plaintiff before the expiration of 14 days after the time limited for appearing. Thus, to comply with the rules, it is the "service" of the defence and not the "filing" thereof which must take place within the time limited for so doing, failing which, default would have occurred. This is to be contrasted with the provisions of O. 12 which govern the entry of appearance to an action and which does not appear to impose any like obligation on a defendant. The only provisions in O. 12 relating to service of a memorandum of appearance on a plaintiff are to be found in O. 12 r. 3 but before mentioning what they are, it is pertinent to point out first that O. 12 r. 1 provides the mode by which appearance may be entered, and that by O. 12 r. 1(3), a defendant may do so by either handing in at the registry or posting to it a properly completed memorandum of appearance and a copy thereof. The time limited for so doing being stated in O. 12 r. 4 RHC. It should next be noted that according to O. 12 r. 2(1) RHC, a memorandum of appearance "is a request to the registry to enter an appearance" for the defendant, and that the request is made by properly completing a memorandum of appearance which must contain the information stated in O. 12 r. 2(2) and (3) and handing them in at the registry or by posting them to the registry. The procedure on receipt of that request is set out in O. 12 r. 3. Thus, for example, where a defendant chooses to enter an appearance by handing in the requisite documents at the registry, an officer at the registry stamps on the copy of the memorandum the date he received those documents and enters the appearance in the cause book and hands back the copy of the memorandum of appearance to the defendant who then, according to O. 12 r. 3(2), must send it by post to the plaintiff on the same date that he entered appearance on. If a defendant has entered appearance by post, then it is the official at the registry who sends to the plaintiff by post the copy of the memorandum of appearance. In either event, it is important to note that the copy of the

memorandum of appearance is only posted to the plaintiff after an appearance is entered in the cause book. From this, it can be seen that the request to enter an appearance is completed when the cause book is entered and that service of the memorandum of appearance on a plaintiff does not have to be effected before the appearance is entered in the cause book. A further observation that can be made is this: The RHC gives to a defendant a time limit within which to enter an appearance and he may exercise such right by handing in a memorandum of appearance and a copy thereof at the registry on the last day of that time limit and thereby cause an appearance to be entered in the cause book, whereafter, he is to post to the plaintiff the copy of the memorandum of appearance returned by the registry. If that be the case, then it must be recognised in the rules that the plaintiff will only receive the copy of the memorandum of appearance outside the time limited for entering an appearance, which in turn indicates that service on the plaintiff of a memorandum of appearance within the time limited for entering an appearance is not a requirement in determining whether a defendant has entered an appearance within the time limited to do so.

For the above reasons, I must reject the submissions of counsel for the plaintiff on this point and hold that the defendant's entry of appearance in this action was within the time limited for so doing; there is no need for the defendant to apply for any extension of time to do so.

Apart from the above, there are other good reasons why the plaintiff's application to set aside the defendant's appearance must be dismissed. Order 2 r. 2 RHC requires that any application to set aside for irregularity, any proceedings or any document shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. I find that the plaintiff has run foul of both these requirements. The plaintiff was well aware of the "alleged irregularities" in the defendant's entry of appearance and the solicitors for the plaintiff even noted its protest on the copy of the appearance served on them on 14 January 2000, yet it took the plaintiff some four months to file its application on 14 April 2000 to set aside the defendant's appearance. In my judgment, in the circumstances of this case, a period of four months cannot be regarded as a reasonable time within which to make the application. I also find that the plaintiff was well aware of the alleged irregularity but nevertheless took a fresh step in the action by entering the judgment in default of defence against the defendant. Having done so, the plaintiff is clearly caught by the provisions of O. 2 r. 2 RHC. The above findings would also dispose off the plaintiff's application to amend its judgment from one in default of defence to one in default of appearance. With an appearance having been entered by the defendant, there is simply no basis for it. I accordingly dismiss the plaintiff's application with costs.

I next consider the defendant's application to set aside the judgment in default of defence.

As the plaintiff had indorsed its writ only with a concise statement of the nature of its claim against the defendant, it was obliged under O. 18 r. 1 RHC to serve a statement of claim on the defendant when the writ was served on the defendant or at any time after service of the writ but before the expiration of 14 days after the defendant had entered an appearance. And as I have already found, the defendant had properly entered an appearance in this action. It is not in dispute that the plaintiff here has not served on the defendant a statement of claim nor has it obtained leave from the court to dispense with service of a statement of claim. Not having done so, was it open to the plaintiff to proceed to enter judgment in default against the defendant?

Counsel for the plaintiff has sought to argue that the plaintiff was entitled to do so and that the judgment was properly obtained and is therefore a regular judgment. His reasons for so arguing are these. Firstly, notwithstanding that the plaintiff's writ was not indorsed with a statement of claim, the plaintiff was not required to serve a statement of claim on the defendant because O. 12 r. 2(2) RHC states that a memorandum of appearance must be in Form 15. When looked at, the following words are found at the bottom of that form:

> The said defendant (requires or does not require) a statement of claim to be filed and delivered.

The plaintiff now says that since the defendant had not indicated in its memorandum of appearance that it required the plaintiff to serve a statement of claim on it, the plaintiff need not do so. While I find this a rather novel argument, it is one I cannot agree with. While O. 12 r. 2(2) does state that a memorandum of appearance must be in Form 15, O. 12 r. 2(3) goes on to specifically state what must be specified in the memorandum of appearance and it is conspicuous that there is no requirement that a defendant must indicate whether or not it requires a statement of claim to be filed and delivered. Apart from that, there is also the specific provisions of O. 18 r. 1 RHC which requires a plaintiff to serve a statement of claim on a defendant unless excused from so doing by the court or the statement of claim is already indorsed on the writ. In my judgment, such provisions are intended for the sole benefit of a defendant, and, in accordance with the general principle that a person may waive any right conferred on him by statute, I am prepared to say that at best the abovementioned words found in Form 15 indicate that a defendant may waive such right but that to do so, a defendant must consciously elect to do so by clear indication in the form, so that on so electing, the defendant will be bound thereby. Until an election is so made, the plaintiff is not excused from delivering its statement of claim on the defendant.

Secondly, it was argued that what the plaintiff had indorsed on the writ was in fact a statement of claim disclosing a full cause of action with all relevant facts pleaded so that the indorsement constituted a pleading to which the defendant should have filed its defence. I regret I find this argument lacking in merit. If, as claimed, the indorsement was a statement of claim, it would have been a simple thing for the plaintiff to entitle it as a statement of claim which was not done. And, if as alleged, the indorsement was a statement of the plaintiff's claim, the plaintiff would also have ended the statement of claim with a prayer for the relief and orders it sought but again this was not done.

It was lastly said that the rule of etiquette which the defendant complains the plaintiff's counsel had not adhered to is irrelevant in considering whether the judgment in default of defence should be set aside. According to counsel for the plaintiff, r. 56 is intended to govern conduct between counsel; if there is any misconduct by counsel, that complaint should be raised in a more appropriate forum and not affect the judgment obtained thereby. The submission of counsel for the plaintiff must meet swift rejection. Far from being irrelevant, the very conduct between counsel which r. 56 seeks to regulate is that of obtaining a judgment in default. It is therefore very relevant to an application such as this. I also find that the submission of counsel does not accord with the intention behind the rule which is to save judicial time and costs all round by the court not having to deal with applications such as this where a judgment which has not been obtained on merits may be set aside on application to the court and which application would not be necessary if counsel knowing that an appearance had been entered for a defendant by another counsel, and in order to afford the defendant an opportunity of being heard, had the courtesy to inform the opposing counsel of his intention to obtain judgment. I should also point out that the fact that an advocate who breaches this rule may be subject to disciplinary action serves to emphasise the seriousness with which a breach is regarded and not as suggested by counsel. I also fully agree with the views expressed by justice RK Nathan in *RHB Finance Bhd v. CN Corporate Network (M) Sdn Bhd & Ors* [2000] 2 CLJ 251 where a similar argument was raised by counsel but rejected by the learned judge.

For the above reasons, I find that the plaintiff was not entitled to enter judgment in default against the defendant and that such judgment having been obtained in breach of the RHC as well as the rules governing the practice of advocates at the Sarawak Bar in respect of obtaining judgments in default, it is irregular. What remains to be determined is whether the judgment which has been irregularly obtained should be set aside. Thankfully, the approach I should take in deciding this question is set out by the Court of Appeal in the case of *Lai Yoke Ngan v. Chin Teck Kee* [1997] 3 CLJ 305. In that case, this is what his Lordship Gopal Sri Ram JCA had to say at p. 319 regarding the discretion vested in the court under O. 2 r. 1 RHC.

> The proper approach is for a court to accept that a breach of a rule of court renders the particular proceeding irregular with a power in the court to excuse the non-compliance. That power, as in all matters calling for curial discretion, is to be exercised judicially having regard to the substantial merits of a case and having particular regard to the interests of justice. Thus, for example, to say that a judgment entered for too much is automatically bad or is automatically curable is to take an extreme position that is unsustainable in law. Such a judgment may be set aside if to cure it by amendment would do greater injustice to the particular defendant. On the other hand, such a judgment may be cured by amendment if not to do thus would result in greater injustice to the plaintiff. Ultimately, it is the objective perception of a court as to where the justice in a particular case lies that determines whether the irregularity should be cured. If the court decides the particular case to be unfit for the exercise of the curative power, then it may set aside the judgment, order or other proceeding.

Relying on what is stated above, it is the submission of counsel for the plaintiff that looking at the case as a whole, the justice of this case does not call for the judgment in default of defence to be set aside because the defendant does not have a defence on the merits to the plaintiff's claim and not having one, the defendant is not entitled to have the judgment in default of defence set aside. On the other hand, setting aside the default judgment would cause greater injustice to the plaintiff when it is clear from the various affidavits filed that the defendant really does not have a credible defence. I regret I do not agree with this submission. On the particular facts of this case, it would be premature to consider whether the defendant has a defence of merits because the plaintiff has not even served a statement of its claim on the defendant. All the defendant is supplied with at the moment is a concise statement of the nature of the plaintiff's claim, to which, the rules of court do not require the defendant to plead in answer to.

In my judgment, the justice of this case calls for the judgment in default of defence to be set aside. It was obtained when the plaintiff was not entitled in law to obtain the same. (See *Syarikat Joo Seng & Anor v. Habib Bank Ltd.* [1986] 2 MLJ 129). It was also obtained in breach of the rules of practice and etiquette concerning default judgments. To leave it standing would be seen as condoning and encouraging such conduct which the court must firmly set its face against. It cannot be amended to a judgment in default of appearance as the defendant has entered an appearance in this action. To allow the judgment to remain would deprive the defendant of a substantive right afforded to it by the rules, namely, to be served a statement of the plaintiff's claim and to file a defence thereto. I accordingly order that the judgment in default of defence be set aside. I also award costs to the defendant in any event in respect of these two applications.